IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Coy Appeal No. 1 of 1999

Judgment reserved on: 9.10.2007

Date of decision: 14.11.2007

M/s Ashoka Alloy Steels Ltd. ..Appellant

Versus

The Board for Industrial and Financial Reconstruction and others ..Respondents

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Coram

The Hon'ble Mr. Justice Deepak Gupta, Judge.

The Hon'ble Mr. Justice V.K.Ahuja, Judge

Whether approved for reporting?[1]

For the Appellant: Mr.R.L.Sood, Senior Advocate, with Mr. Vikas Rajput, Advocate

For respondent No.2: Mr. M.S.Chandel, Advocate General, With Mr. R.M.Bisht, DAG.

For respondent No.3: Mr. Ankush Sood, Advocate

For respondent No. 6. Mr. Bimal Gupta, Advocate

Deepak Gupta, J.

The following two interesting questions of law arise for decision in the aforementioned appeal:-

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment?***

1. Whether the Company Judge exercising powers under Section 20(2) of the Sick Industrial Companies (Special Provisions) Act, 1985 is bound by the recommendations/opinion of the Board for Industrial Financial Reconstruction (BIFR) under Section 20(1) of the SICA recommending winding up of the company ?
2. What is the procedure to be followed by the Company Judge while proceeding with the winding up of the sick industrial company, under Section 20(2) of the SICA.

It is not necessary to give the detailed facts of the case. The appellant is a company duly incorporated under the Indian Companies Act, 1956 having its head office at Village Missarwala, Post Office Majra, Tehsil Paonta Sahib, District Sirmour. By the year 1990, the company had lost all its equity and could not pay the installments of loans raised from the financial institutions. The plant of the company was closed in 1990. Thereafter the case of the company was taken up by the BIFR in the year 1991 and rehabilitation scheme was sanctioned by the Board in December, 1994. Despite such rehabilitation scheme having been sanctioned, the company could not

be resuscitated and was declared to be not viable in February, 1997. The BIFR issued show cause notice to the company as to why it should not be wound up. The company approached the appellate authority. A debt reschedulement scheme was circulated by the appellate authority, but the promoters could not establish their resourcefulness and the said scheme could not be sanctioned by the appellate authority. The appeal filed by the company was dismissed on 20th January, 1999 since the company and its promoters were unable to mobilize and induct funds.

Thereafter the Board after hearing the parties including the promoters, the State of Himachal Pradesh, the lending institutions, i.e. the State Bank of India, H.P. Financial Corporation, H.P. Small Industrial Corporation etc. heard the matter and came to the conclusion that there was no viable proposal to revive the company. It also held that the promoters were not serious nor resourceful to revive the company. The Board was of the opinion that the company was not likely to become viable in future and, therefore, it would be just, equitable and in public interest that the company be wound up in terms of

Section 20(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA). The opinion of the Board was forwarded to this court. Notices were ordered to be issued to the parties on 20th May, 1999. The company could not be served at its registered office. The summons came back with the report that the company is lying closed for the last 3 years. Notice was then sent to the Managing Director of the Company at his address at Chandigarh and notice was served on him on 30th September, 1999. Thereafter the company put in appearance through counsel in court on 6th October, 1999. The matter came up before the learned Company Judge on 8.12.1999 who passed the following order:-

"8.2.1999 Present: Mr.K.D.Aggarwal, with Mr. J.L.Bhardwaj, counsel for respondents No. 4 and 6.

Mr. A.K.Sood, counsel for respondents 1 & 2.

Mr. Kuldip Singh, Sr.Advocate With Ms. Jyotika, counsel for respondent No.7.

Mr.Ankush Sood vice Mr.B.C.Negi, for respondent No. 9.

Co.Pet. No.3/99

Heard. The Board for Industrial and Financial Reconstruction has vide its order dated 1.4.1999 found that the company M/s Ashoka Alloy Steel (P) Ltd. having its registered office at village Misserwala, Post Office Majra, Tehsil Paonta Sahib, District Sirmour is a sick industrial company and that it cannot be rehabilitated. It has further come to the opinion that the company should be wound up under Section 20(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 in the public interest. The period for filing an appeal against such an order has since elapsed.

Under the circumstances, exercising the powers under sub-section(2) of section 21 of the abovesaid Act, it is ordered that the company M/s Ashoka Alloy Steel Private Limited shall be wound up. The official liquidator is directed to take over the affairs of the company. Notice in this behalf shall be published in the Indian Express and Jansatta, Chandigarh Edition and it shall also be published in the H.P. Rajpatra within one month.

Dasti copy on usual terms."

Aggrieved by the said order, the Company has filed this appeal before this court. Mr. R.L.Sood, learned senior Advocate, has challenged the said order on the following grounds :-

1. That on the first date of hearing the Company Judge proceeded to pass the order without giving any opportunity to the petitioner Company to put forth its case
2. That the recommendations of the BIFR may at best be taken seriously, but the company Judge is not bound by the same and should have given his own reasons for accepting or rejecting the opinion of the BIFR ;
3. That before ordering winding up, notice of the petition should have been given to the other creditors, workmen and other persons entitled to notice under the Companies Act.

Mr. R.L. Sood, learned Senior counsel appearing for the company, has also urged that during the pendency of this appeal the promoters of the Company have pumped in crores of rupees into company and, therefore, the company is now viable and is working and the order of winding up should not be passed. We are not dealing with this submission because of the view we are taking on the other points raised by Mr. R.L.Sood, learned Senior Advocate.

Mr. Ankush Dass Sood, Advocate, appearing for the Central Bank of India has contended that the order is just and reasonable. He contends that the company

was a sick company and for 8 long years its case was pending before the BIFR. He submits that the company has not field any appeal or writ against the order of the Board and hence cannot complain that it has got no opportunity to challenge the same. He also submits that the Board consists of persons who are eminently qualified to decide whether the company should be wound up or not and this opinion is virtually binding on the company Judge.

To appreciate rival contentions of the parties it would be appropriate to refer to Section 20 of the SICA which reads as follows:-

> "**20. Winding up of sick industrial company.**-[(1) Where the Board, after making inquiry under Section 16 and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of opinion that the sick industrial company is not likely to make its networth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record and forward its opinion to the concerned High Court.]

(2) The High Court shall, on the basis of the opinion of the Board, order winding up of the sick industrial company and may proceed and cause to proceed with the winding up of the sick industrial company in accordance with the provisions of the Companies Act, 1956 (1 of 1956).

(3) For the purpose of winding up of the sick industrial company, the High Court may appoint any officer of the operating agency, if the operating agency gives its consent, as the liquidator of the sick industrial company and the officer so appointed shall for the purposes of the winding up of the sick industrial company be deemed to be, and have all the powers of, the official liquidator under the Companies Act, 1956 (1 of 1956).

(4) Notwithstanding anything contained in sub-section (2) or sub-section (3), the Board may cause to be sold the assets of the sick industrial company in such manner as it may deem fit and forward the sale proceeds to the High Court for orders for distribution in accordance with the provisions of Section 529-A, and other provisions of the Companies Act, 1956 (1 of 1956)."

A perusal of the aforesaid section shows that under sub section (1) the Board is required to make an inquiry by giving opportunity of hearing to all concerned parties. If it forms the opinion that the sick industrial company is not likely to become viable then it may record

and forward its opinion to the concerned High Court. The concerned High Court means the High Court where the registered office of the company is situate. Sub section (2) provides that the High Court "shall" on the basis of the opinion of the Board order winding up of the industrial company. The question that arises is whether the word "shall" makes it mandatory on the High Court to follow the opinion of the Board and order winding up or does the High Court have the judicial discretion to consider the opinion of the Board and make its own assessment in the matter.

This question first came up for consideration before the Madras High Court in **J. M. Malhotra Vs. Union of India and others (1997) Vol. 89 Company cases 600**. In that case the validity of section 20 of the SICA was challenged on the ground that it takes away the power of judicial review which vests in High Court. The Madras High Court held that the Board constituted under the SICA consists of persons who are experts in the field. The Court held as follows:-

> "The Board, as already pointed out, consists of persons who are experts in the field. It is presided over by a person who has been or is qualified to be

a judge of the High Court. It has to record its opinion with reasons after considering all the relevant facts and circumstances and after hearing all the concerned parties. Thus, the Board, while acting under section 20, acts as a judicial body consisting of experts in the field."

The court thereafter went on to hold as follows:

"The report of the Board would become the basis for a proceeding to be continued against the sick industrial company for winding up in accordance with the provisions of the Companies Act. Sub-section (2) of section 20, which is already reproduced, specifically states that the High Court shall, on the basis of the opinion of the Board, order winding up of a sick industrial company and may proceed or cause to proceed with the winding up of the sick industrial company in accordance with the provisions of the Companies Act. Therefore, it is clear that the opinion furnished by the Board will only form a basis for the proceedings to be continued against the sick industrial company for the purpose of winding up and the further proceedings are to be conducted in accordance with the provisions contained in the Companies Act for winding up of the company. Thus, what sub-sections (1) and (2) of section 20 dispense with is only the requirement of section 439 or 440, as the case may be, of the Companies Act for the purpose

> of initiating a proceeding for winding up of the company under Part VIII, Chapter II and also the enquiry into the question as to whether it is just and equitable to order winding up of a company. The rest of the proceeding for winding up shall have to be conducted in accordance with the provisions of the Companies Act. Sub-section (2) of section 20 of the Act is not happily worded. Though it opens with the words "High Court shall, on the basis of the opinion of the Board, order winding up of the sick industrial company", but nevertheless, it further says that "and may proceed and cause to proceed with the winding up of the sick industrial company in accordance with the provisions of the Companies Act, 1956". Therefore, it appears to us that even though the opinion submitted by the Board forms the basis for ordering winding up of the sick industrial company by the High Court, it is nevertheless open to the High Court to go into the correctness of the opinion so submitted by the Board and decide as to whether it should proceed and cause to proceed with the winding up of the sick industrial company, in accordance with the provisions of the Companies Act."

The Madras High Court further went on to hold that the High Court is not precluded from examining the correctness of the opinion of the Board and it is not obligatory on the High Court to order winding up of the

sick industrial company on the basis of the opinion of the Board without examining the correctness of such opinion after hearing the concerned parties. However, an important caveat was added that normally such opinion being an opinion of a Board consisting of experts will have greater weight in deciding the question as to proceeding with the winding up of the sick industrial company and the opinion of the Board cannot be lightly brushed aside. Thereafter this matter was carried to the Apex Court and the Apex Court in **V.R. Ramaraju Vs. Union of India and others (1997) Vol. 89 SC 609** held as follows:-

> "It is obvious that sub-section (2) has to be construed to mean that the High Court in deciding the question of winding up of the company has to take into account the opinion of the Board forwarded to it under sub-section (1) and is not to abdicate its own function of determining the question of winding up. So read, sub-section (2) does not suffer from any infirmity. This in substance is the view taken by the High Court in the impugned order.
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> The special leave petition is, therefore, dismissed."

It is thus apparent that the Supreme Court has held that the Company Judge cannot abdicate his own function of determining the question of winding up. Thus the Company Judge can go into the question whether the opinion of the Board recommending winding up of the company is proper or not.

It is obvious that in view of the judgment of the Apex Court the Company Judge is not to act like a post office and merely stamp his approval on the opinion of the Board and order winding up of the company. He must consider the recommendation of the Board, form his own opinion and thereafter proceed with the matter.

A learned Single Judge of this court in **Tata Iron and Steel Co. Vs. Him Ispat Ltd. (2002) 108 Company Cases 537** held as follows:

> "So far as the opinion of the BIFR and the AAIFR under the SICA is concerned, it is relevant to be taken note of by the court. And it is thereafter that it has to form its own opinion, whether the company is to be wound up or not."

A division bench of the Calcutta High Court in **Eastern Paper Mills Ltd. Vs. Board for Industrial**

and Financial Reconstruction and others (2002) Vol. 109 Company Cases 1065 held as follows:-

> "As observed by the Madras High Court in its judgment in J.M. Malhotra's case, when once a report is submitted by BIFR/AAIFR, the same would become the basis for a proceeding to be continued against the sick industrial company for winding up in accordance with the provision of the Companies Act. Sub-section (2) of section 20 specifically states that the High Court shall, on the basis of the opinion of the Board, order winding up of a sick industrial company and may proceed or cause to proceed with the winding up of the sick industrial company in accordance with the provisions of the Companies Act. Therefore, it is clear that the opinion furnished by the BIFR/AAIFR can only form a basis for the proceedings to be continued against the sick industrial company for the purpose of winding up and the further proceedings are to be conducted in accordance with the provisions contained in the Companies Act for winding up of the company.
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> Upon receipt of the opinion of the BIFR/AAIFR the learned company judge in accordance with the practice obtaining in this High Court, rightly in our opinion, gave notice to the company and also an opportunity of hearing was afforded to the company after it had filed its affidavit-in-opposition. The learned company judge ought to have thereafter formed the prima facie opinion and directed

admission of the petition and advertisement thereof in newspapers. It is only after advertisements are published, as held by the Division Bench in Khaitan Paper Machine Ltd. Vs. Wires and Fabrics (S.A.) Ltd. (A.C.C. No. 16 of 1999, C.A. No. 361 of 1999, C.P. No. 432 of 1997, the matter becomes a representative one. Even at that stage the court was not bound to wind up the company as it did."

The Gujarat High Court in **Board Opinion Vs. Hathising Manufacturing Company Ltd. and others (2004) 119 Company Cases 25** also held that the opinion of the BIFR is not binding on the court and the court has to take independent decision after evaluating the facts placed before it as well as after considering the recommendations made by the Board for winding up of the company. Though it agreed with the order of the Board, the court, however, did not pass order of winding up straightaway, but directed that the company petition be admitted and ordered advertisement of the petition.

A learned Single Judge of Bombay High Court in M**odistone Ltd., In re (2004) Vol. 119 Company Cases 232** held as follows:-

"In my opinion, therefore, once the Board recommends and sends its opinion to the High Court under section 20(1), the High Court, in

terms of section 20(2), is obliged to pass an order of winding up of the company without following the procedure laid down under the Companies Act. The court, therefore, has to follow the procedure under the Companies Act for giving effect to the order of winding up. In the instant case, therefore, the company stands wound up based on the report of the Board dated April 25, 2001."

In our opinion this authority does not lay down the correct law in view of the judgment of the Apex Court in Rama Raju's case supra.

The Gujarat High Court in **Board for Industrial and Financial Reconstruction Vs. Unity Steels Ltd. (2002) Vol. 109 Company Cases 236** dealt with this matter in detail. On the basis of the judgment of the Madras High Court and the Apex Court, the learned Judge held as follows:-

"Having heard the learned advocates at length, I am of the opinion that when section 20 of the SICA provides for tendering of Board opinion for winding up of a sick industrial company, it would necessarily mean that the High Court to whom such an opinion is tendered will be required to follow the procedure with regard to admission of a petition registered as a result of such an opinion tendered under section 20 of the SICA. Otherwise, the role of

the High Court would be that of a rubber stamp upon the receipt of Board opinion as noted in the aforesaid Madras High Court decision as approved by the Supreme Court. The submissions of Mr. Singhi might sound attractive, but obviously run counter to the latest decision of the Supreme Court in V.R. Ramaraju Vs. Union of India (1997) 89 Comp. Cas. 609, where the Supreme Court has said that section 20(2) of the SICA has to be construed to mean that the High Court in deciding the question of winding up of the company has to take into account the opinion of the Board forwarded under sub-section (1) and is not to abdicate its own function of determining the question of winding up. If that is so the mandate of the statute as appearing in the aforesaid rule 96 read with rule 99 read with rule 24 of the Companies (Court) Rules will stand violated and the very purpose behind the same will also stand defeated, in case winding up order is passed upon receipt of the Board opnion."

The Gujarat High Court in **Kamdar Ladat Simiti of Nanikram Shobraj Mills Ltd. and Association Union Vs. Nanikram Shobraj Mills Ltd. (2005) Vol. 125, page 740** also took a view that opinion of the Board is not binding on the court.

In view of the various decisions quoted above and the bare provisions of law it is more than clear that the court is not bound by the opinion of the Board. It is in fact obligatory upon the court to examine the opinion of the Board. The court may decide either to proceed with winding up or to even reject the opinion of the Board.

The next question which arises is what is the procedure to be followed by the court which is considering the opinion of the Board. On behalf of the petitioner it has been canvassed that the entire procedure as laid down in The Companies (Court) Rules, 1959 (for short the Rules) must be followed and the company cannot be ordered to be wound up without following this procedure.

Rule 96 of the Rules provides that a petition for winding up shall be listed for admission before the Judge in Chambers who may issue directions for the advertisement to be published and the person, if any upon whom copies of the petition are to be served. The Judge may, if he thinks fit, direct that notices be given to the company before giving directions as to the advertisement of the petition. Thereafter the petition is to be advertised in terms of the rules and after hearing the

parties the court can order winding up. Under Rule 106 after admission of the petition for the winding up of the company the court may appoint the official liquidator to be the provisional liquidator of the company pending final orders on the winding up petition. Rule 106 empowers the court after admission of the petition for winding up to appoint a provisional liquidator upon the application of a creditor, contributory company or of the company itself. Where the company is not the applicant, notice of the application should be given to the company unless the court for special reasons dispenses with the notice. Rule 112 provides for the directions to be given at the time of winding up and Rule 113 provides for the advertisement of the order of winding up.

From a perusal of the various rules, it is apparent that winding up is normally not ordered straightaway. When any petition for winding up is taken up by the Judge, he may either order advertisement of the petition at the first stage or may even first decide to hear the company or any other person before even advertising the petition. Advertisement of a petition of winding up itself may sometimes cause irreparable harm to the

company. The practice in this court has been that normally an order of advertisement is not passed without first hearing the company.

However, in the case where the opinion is given by the Board there is a considered judicial opinion of a body of experts who have gone into all economic and legal details and who have come to the conclusion after hearing the parties that it is just and equitable to wind up the company. This opinion of the Board cannot be brushed aside. This opinion must be given its due weightage. SICA was enacted to give benefit to sick industrial companies so that they could be rehabilitated. The Board and the appellate authority under SICA have very wide powers to enable the reconstruction of the company. They in fact exercise many powers which are not even vested in the company Judge. However, as discussed above, the opinion of the Board is only an opinion and cannot bind the High Court. The High Court is bound to form its own opinion in the matter. Therefore, when the opinion of the Board is received in the High Court, there are two options before the Company Judge. He, after perusing the opinion of the experts, may

come to the conclusion that it is a fit case where the advertisement can be issued without issuing notice or giving hearing to the company or he may decide to issue notice to the parties before passing orders. In cases where the Board recommends the winding up of a company, the Company Judge may dispense with the usual practice of issuing notice to the company before ordering advertisement of the winding up petition. The court may also appoint, if it deems fit, a provisional liquidator at the initial stage itself. In our considered opinion he, however, cannot order the winding up of the company straightaway. If the Company Judge decides to issue notice to the parties, it may hear them and then decide whether the petition is to be advertised or not. Even after the advertisement has been issued, the court can hear all the concerned parties and decide to either drop the winding up proceeding or to proceed with the winding up of the company.

It has been strenuously urged before us that the company was not given reasonable opportunity of being heard in the matter. We are not in agreement with this contention. Under Section 25 of the SICA the order

passed by the Board can be challenged by the aggrieved party before the appellate authority. Admittedly the company has not filed such an appeal. In exceptional cases even without approaching the appellate authority a party may file a writ petition before the court concerned. No such writ has been filed in the case. The right to challenge the opinion of the Board as far as the parties which were represented before the Board are concerned, are governed by Section 25 of the SICA. If they choose not to exercise their right of appeal under Section 25, they have no right to raise separate objections to the report of the Board. Further, in the present case as we have already noticed above, the company was served on 30th September, 1999. The company was represented before the learned Single Judge on the date when the order was passed. No plea was raised that it wanted to object to the orders of the Board recommending winding up of the company. The impugned order has been quoted above and from a perusal of the order it appears that no objection was raised by the company when the order was being passed. The company had already been served. It was also represented before the Board which had

forwarded the opinion to the court. The company should have been vigilant to protect its right and if it wanted to raise objections to the opinion of the Board, it should have filed an appeal and in case an appeal was not filed, it could have still filed its objections before the court when it received notice. It is not duty of the court to ask the parties to file objections. Therefore, we are of the opinion that the company had more than ample opportunities to place its case before the learned Single Judge.

In view of the above discussion we are clearly of the view that the order of the learned single Judge ordering winding up of the company solely on the basis of the opinion of the Board cannot be sustained. The learned Judge did not form his own opinion in the matter. As held above, the Company Judge should have formed his own opinion and thereafter was bound to follow the Companies (Court) Rules from the stage of advertisement of the petition of winding up onwards.

In view of the above discussion the impugned order is set aside and the matter is remanded to the learned Single Judge who shall consider the opinion of the Board in light of the law as mentioned hereinabove

and pass such orders on the petition as he deems fit. Keeping in view the fact that the matter has been pending for a long time, we would request the learned Single Judge to hear the matter and pass appropriate orders as expeditiously as possible. The petition is disposed of in the aforesaid terms with no order as to costs. The parties are directed to appear before the learned Company Judge on 11th December, 2007. The Registry shall ensure that the matter is listed before the learned Company Judge on the said date.

(Deepak Gupta), J.

November 14, 2007(K) (V.K. Ahuja), J.